80-642

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ELEANORE M. RAYMOND, ADMINISTRATRIX
OF THE ESTATE OF ALVARO J. RAYMOND,
PETITIONER,

v.

I/S CARIBIA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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I

QUESTIONS PRESENTED

I. Whether that duty of reasonable care owed by a ship owner to a longshoreman, as set forth by *Santos* v. *Scindia Steam Navigation Co.*, 598 F.2d 480 (9th Cir. 1979), *Griffith* v. *Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116 (3rd Cir. 1979), and *Johnson* v. *A/S Ivarans Rederi*, 613 F.2d 334 (1st Cir. 1980), can be altered or limited in order to exclude liability for a dangerous condition of stowed cargo which the shipowner creates so that the doctrines of assumption of the risk and contributory negligence inherent with Section 343 and Section 343(a) of the Restatement (Second) of Torts will act as a complete bar to a longshoreman's action against a shipowner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

OPINION BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals for the First Circuit was rendered on July 24, 1980, No. 79-1288, and is printed in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, (as amended in 1972), 33 U.S.C. § 901, *et seq*. In particular, 33 U.S.C. § 905(b), which states:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.
>
> Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426; Oct. 27, 1972, Pub. L. 92-576, § 18(a), 86 Stat. 1263.

STATEMENT OF THE CASE

Suit was commenced by the Plaintiff, Eleanore M. Raymond, as administratrix for the Estate of Alvaro J. Raymond, in the United States District Court for the District of Massachusetts, for the wrongful death of Alvaro J. Raymond, based upon diversity jurisdiction, and pursuant to 33 U.S.C. § 905(b) of the Longshoremen's and Harbor Workers' Compensation Act.

The owners of the vessel, I/S CARIBIA, contracted with a stevedore for the manual discharge of cargo from the vessel. Plaintiff's decedent, Alvaro J. Raymond, was employed as a longshoreman. by the stevedore, for the manual discharge of the cargo of the I/S CARIBIA.

On October 9, 1973, in Gloucester, Massachusetts, along with a gang of fourteen other men, Plaintiff's decedent began to discharge cargo from the middle hold of the vessel, I/S CARIBIA. The cargo, cardboard boxes of frozen fish weighing a minimum of fifty-five pounds each, would be carried box by box to a rack which was hoisted out of the hold by crane. When the longshoremen had approximately twenty to thirty minutes work remaining in the hold before finishing, the longshoremen encountered distressed cargo. Distressed cargo is that cargo which is unusually difficult to discharge because it is frozen together, broken apart, or in some manner damaged. Longshoremen are paid by tonnage taken off the ship, not by the hour. As it takes much more time to unload distressed cargo, renegotiation of the rate of pay is necessary.

There is a custom in Gloucester Harbor, where these longshoremen work, which is followed under the specific circumstances where distressed cargo is encountered. This custom and practice is that if distressed cargo is discovered when the cargo hold is first opened, or when a great amount of cargo remains to be unloaded, then the longshoremen leave the vessel and renegotiate the rate of pay. However, when

there is only approximately thirty minutes of cargo remaining to be unloaded, the longshoremen seek the aid of the vessel's crew to remedy the distressed cargo situation. This has been the custom for many, many years, and became, and has remained the custom as it is the most expeditious to all parties involved, alleviating the necessity to renegotiate for the small amount of remaining distressed cargo.

This custom was, in fact, the procedure followed by the gang discharging the I/S CARIBIA on October 9, 1973. During the discharge operation when the distressed cargo was discovered, the longshoremen stopped work. The longshoremen's walking boss reported the condition to the ship's officer who sent two members of the vessel's crew down into the hold to free the distressed cargo so as to enable the longshoremen to discharge that cargo. The vessel's crew brought at least one crowbar and forced it between boxes, freeing the boxes. As the vessel's crew loosened a number of boxes by prying them apart, they would step aside and point, directing the longshoremen to remove those boxes that the vessel's crew indicated to be loose.

The vessel's crew indicated to Plaintiff's decedent that an area of boxes at shoulder height had all been loosened. In reliance upon the vessel's crew's representation that the boxes were loose (as one could not tell by eye-sight alone), Plaintiff's decedent slid a shoulder height box toward himself. In fact, the vessel's crew had not properly loosened the boxes. Two boxes, double the normal weight, fell towards Plaintiff's decedent. As Plaintiff's decedent tried to stop the fall of these boxes, he was pulled down to his knees onto the deck by their weight.

Subsequently, Plaintiff's decedent became ill, having difficulty breathing, pains in his chest, and vomiting. He left the vessel, and after a short while, drove his car to a nearby pier where he was found, in his car, following a collision with a parked truck. Plaintiff's decedent was pronounced dead upon

arrival at the hospital. Plaintiff's medical expert testified that it was his professional medical opinion that Plaintiff's decedent had suffered a fatal heart attack, and that the heart attack had been directly caused by the severe, unexpected exertion and stress Plaintiff's decedent encountered with the doubled weight of the frozen cargo. There was much testimony at trial that double the normal load is extremely dangerous when one is not prepared for it.

The jury found against the Defendant shipowner on liability, but also found that Plaintiff's decedent was 50 percent contributorially negligent. The First Circuit Court of Appeals reversed the decision stating that 1) the condition of the cargo is not a condition of the ship for which the vessel may be liable; and 2) that the condition did not create an unreasonable risk of harm.

SUMMARY OF ARGUMENT

Santos v. *Scindia Steam Navigation Co.*, *Griffith* v. *Wheeling-Pittsburgh Steel Corp.*, and *Johnson* v. *A/S Ivarans Rederi*, based upon that reasoning and standard of reasonable care put forth by the Court in *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S. Ct. 406, 3 L.Ed. 2d 550 (1959), have established that a duty of reasonable care is owed by a shipowner to a longshoreman.

The Plaintiff-Petitioner's decedent, Alvaro J. Raymond, died as a result of a dangerous condition created by the shipowner during the handling of the cargo by the ship's crew.

The First Circuit Court of Appeals, in *Raymond*, has altered or limited the standard of reasonable care owed by the shipowner as set forth in *Santos*, *Griffith*, and *Johnson*, and has incorrectly applied the Restatement (Second) of Torts, Sections 343 and 343(a) by stating no liability exists on the part of the shipowner when the condition is open and obvious.

The *Raymond* decision in stating that as long as the

longshoreman knows of the existence of the hazardous condition liability cannot exist on the part of the shipowner, has impermissibly returned to application of the doctrine of assumption of the risk and has made contributory negligence a complete bar to the longshoreman's action.

The application of the doctrine of assumption of the risk and Restatement (Second) of Torts Sections 343 and 343(a) incorporates the application of rules involving land based torts and of invitees and licensees. This is contrary to the traditions of maritime law and the intent of Congress in creating the 1972 amendments to Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act.

That standard which must be applied in the *Raymond* case is that standard of reasonable care first established by *Kermarec* and adopted by *Santos*, *Griffith*, and *Johnson*.

Plaintiff-Petitioner now seeks a writ to issue, to review the decision of the First Circuit Court of Appeals, as this decision is inconsistent with established law, as developed by cases both within the First Circuit and other Circuits, and contradictory to the intent of Congress in creating the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act.

ARGUMENT

THE STANDARD OF CARE OWED BY A SHIPOWNER TO A LONGSHOREMAN IS THAT OF REASONABLE CARE UNDER ALL THE CIRCUMSTANCES, INCLUDING A DANGEROUS CONDITION OF CARGO CREATED BY THE SHIPOWNER.

The Longshoremen's and Harbor Workers' Compensation Act, does not define negligence, and the Courts have strived to develop a standard to apply and follow. The legislative history has provided articulate guidance and assistance to the Courts in determining how the standard of care constituting negligence is to be construed and applied so as to most

effectively carry out the intent of Congress. Relevant clauses of the legislative history frequently cited are:

> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.
>
> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.
>
> House Report, reprinted in 3 U.S. Cong. & Admin. News 4698 (1972) at 4703-04.

Clearly, the overriding purpose of the 1972 amendments was to create incentives for safety in the nation's second most dangerous profession. *Johnson*, 613 F.2d at 339. This Court established the foundation for others to follow in *Kermarec*. Justice Stewart wrote:

> It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those

> lawfully aboard the vessel who are not members of the crew.
>
> *Kermarec*, 358 U.S. at 629.
>
> We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.
>
> *Id.*

With reliance upon the foundation of *Kermarec*, and with the intent of Congress specifically set forth in the legislative history, the Courts have developed a standard which adopts the standard of reasonable care under the circumstances. *Santos*, *Griffith*, *Johnson*, *Gallardo* v. *Westfal-Larsen & Co., A/S*, 435 F. Supp. 484 (N.D. Calif., 1977), *Matthews* v. *Ernst Russ SS, Co.*, 603 F.2d 676 (7th Cir. 1979), *Bachtel* v. *Mammouth Bulk Carriers*, 605 F.2d 438 (9th Cir. 1979), *Lawson* v. *United States*, 605 F.2d 448 (9th Cir. 1979).

The First Circuit in *Johnson* set forth that standard of reasonable care which first appeared in *Gallardo* and was raised to maturity in *Santos* and *Griffith*.

> The standard of reasonable care under the circumstances permits a finding of negligence upon a showing:
>
> (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury;
>
> (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and
>
> (3) that the vessel failed to exercise reasonable care to protect the longshoremen against the danger.

Under this standard, the principal inquiry will be

> whether the vessel permitted the existence of a condition that posed an unreasonable risk of harm to the longshoreman. Whether the risk of harm was in fact unreasonable may be determined by balancing the usefulness to the ship of the dangerous condition and the burden involved in curing it against the probability and severity of the harm it poses.
>
> *Johnson*, 613 F.2d at 348.

This standard of reasonable care under the circumstances is that standard of the First, Third, Seventh and Ninth Circuits, as it has been developed to closely adhere to the intent of Congress in creating the 1972 amendments.

The First Circuit Court of Appeals in *Raymond*, has determined, based upon the facts of this case, that no legal liability exists on the part of the vessel. The decision in *Raymond* at App. 5 states: "But liability cannot be bottomed on a condition of the cargo *known to the longshoreman* (emphasis added) which the crew, at the request of the stevedore, attempts to correct." At App. 5 *Raymond* states: "The stevedore is hired for its expertise in handling cargo, . . ." and App. 6, "Although the crew members were not borrowed servants, they were acting as longshoremen in helping to unload the hold." These statements strongly imply that the Plaintiff's decedent assumed the risk of the frozen cargo when he performed his work following the directions of the vessel's crew who had supposedly freed the frozen boxes. This holding is directly in conflict with the *Johnson* case, of the First Circuit, as well as the following cases: *Gallardo* v. *Westfal-Larsen & Co.*; *Santos* v. *Scindia Steam Navigation Co.*; *Matthews* v. *Ernst Russ, SS, Co.*; *Bachtel* v. *Mammouth Bulk Carriers, Ltd.*; *Lawson* v. *United States*; and *Griffith* v. *Wheeling-Pittsburgh Corp.*, in that it effectively applies those standards contained within Restatement (Second) of Torts, Sections 343 and 343(a) wherein no duty is owed if the condition is open and obvious.

The application of Restatement (Second) of Torts Sections 343 and 343(a) enabled defendants to "receive the benefit of a partial or absolute bar to liability having the characteristics of a defense based upon an implied assumption of risk." *Gallardo*, 435 F. Supp. at 494. The decision in *Raymond* makes contributory negligence a complete bar to plaintiff-petitioner's action.

This improper application of assumption of the risk and contributory negligence as a complete bar, was done by many courts subsequent to the 1972 amendments to the Act. Courts held that the only duty owed by a shipowner to a longshoreman was to warn him of hidden and latent defects, and not conditions which were open and obvious; e.g., *Anuszewski* v. *Dynamic Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976); *Gay* v. *Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977); *Brown* v. *Mitsubishi Shintaku Ginko*, 550 F.2d 331 (5th Cir. 1977); *Munoz* v. *Flota Merchante Grancolombiana*, 553 F.2d 837 (2nd Cir. 1977); *Ruffino* v. *Scindia Steam Navigation Co.*, 559 F.2d 861 (2nd Cir. 1977). However, it was the explicit intent of Congress to reject common law rules of contributory negligence and assumption of the risk in favor of applying the admiralty concept of comparative negligence. *Santos*, 598 F.2d at 486; *Johnson*, 613 F.2d at 340; *Griffith*, 610 F.2d at 125; *Gallardo*, 435 F. Supp. at 494.

It is with reliance upon the decision of this Court in *Kermarec*, and the legislative intent in creating the 1972 amendments to The Longshoremen's and Harbor Workers' Compensation Act, that the First, Third, Seventh, and Ninth Circuits have adopted that standard of reasonable care as set forth above in *Johnson*.

The shipowner has a duty to use reasonable care to provide a safe place to work, and the shipowner's duties to longshoremen do not end when the stevedore begins the unloading process. *Santos*, 598 F.2d at 489-90. The First

Circuit in *Johnson* recognized that the legislative history demonstrates the Congressional intent to require the vessel to take affirmative steps to assure the safety of the longshoremen while on board the vessel by citing from the House Report:

> Thus nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition. (p. 339)

The First Circuit incorporated this legislative history into the *Johnson* decision by stating:

> In addition, it [the legislative history] strongly implies that Congress believed the 1972 amendments continued, rather than created, a duty on the part of the vessel to maintain a safe place to work. (p. 339)

The crew of the I/S CARIBIA, pursuant to its obligation of the long established custom and practice, did exercise an affirmative action, during the discharge operation to remedy the frozen cargo, but failed to do so in a proper fashion, creating an unreasonable risk by which the Plaintiff's decedent was caused serious and fatal injury when the vessel's crew directed him to an area to perform his work.

Therefore, the *Raymond* decision, in resorting to assumption of the risk, making contributory negligence a complete bar to recovery, and failing to apply those tests to determine liability on the part of the vessel as set forth in *Santos*, *Griffith*, *Johnson*, and other cases, is improper, conflicts with those cases, and is directly opposite to and ignores the Congressional intent behind the creation of the 1972 amendments to The Longshoremen's and Harbor Workers' Compensation Act.

CONCLUSION

The First Circuit's decision in *Raymond* has created a conflict not only within the Circuit, but among at least four other Circuits. The *Raymond* decision is also antithetical to the Congressional intent in creating the 1972 amendments to The Longshoremen's and Harbor Workers' Compensation Act, in particular, 33 U.S.C. § 905(b).

For the preceding reasons, and for those enumerated in the foregoing brief, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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APPENDIX

United States Court of Appeals
For the First Circuit

No. 79-1288

ELEANORE M. RAYMOND, ADMINISTRATRIX OF THE ESTATE OF ALVARO J. RAYMOND,

PLAINTIFF-APPELLEE,

v.

I/S CARIBIA,

DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[HON. HERBERT N. MALETZ,* *Judge*]

Before

ALDRICH and BOWNES, *Circuit Judges*,
PETTINE,** *District Judge*.

Thomas E. Clinton, with whom *Astrid C. Glynn* and *Glynn & Dempsey* were on brief, for appellant.

Michael B. Latti, with whom *Latti & Flannery Associates* was on brief, for appellee.

July 24, 1980

BOWNES, *Circuit Judge*. This wrongful death action, which implicates section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), was brought by plaintiff-appellee, Eleanore Raymond, as administratrix of the estate of her husband, Alvaro Raymond, against defendant-appellant, the I/S Caribia. The defendant ship has appealed a jury verdict in favor of plaintiff.

There are two issues on appeal: whether the members of the ship's crew working in the hold were borrowed servants of the stevedore; and whether, under the facts, the ship could be found liable.

*Of the U.S. Customs court, sitting by designaton.

**Of the District of Rhode Island, sitting by designation.

The facts are not in dispute, although the parties ascribe different inferences to them. Plaintiff's husband was a longshoreman-lumper employed by a stevedore as one of a gang of twelve men to manually discharge a cargo of cartons of frozen fish from the hold of the I/S Caribia. The fish cartons, each of which weighed 50-55 pounds and measured 15" x 12" x 12", were stowed on top of each other in tiers in the hold. The procedure followed was for the individual lumper to pull a carton from the tier and place it on a cargo rack, which, when loaded, was hoisted out of the hold by a crane. When about one-half hour's work remained for clearing the hold, the lumpers found that the cartons had become frozen together so solidly that they could not be separated by hand or the use of their regular hooks. When cargo is unusually difficult to handle because it is frozen, broken apart or damaged in some other way, it is called "distressed cargo." Because longshoremen are paid by tonnage unloaded, not by the hour, if handling distressed cargo is going to take a lot more time and effort than originally anticipated, the ship and stevedore renegotiate their contract. Since there was only a short amount of time left to unload this hold, renegotiation in this case was unnecessary. The stevedore, here, had two choices: send the lumpers out on the pier to obtain crowbars and icebars, or request help from the ship's crew. The latter course was followed to save time and two members of the crew, armed with crowbars, came down into the hold to pry apart the frozen cartons. No orders or directions were given the crew members by the foreman of the lumper gang or its members. In fact, the longshoremen didn't even know whether the crew spoke English. The crew members were not paid by the stevedore or longshoremen.

After the two crewmen entered the hold, they proceeded to pry apart a number of the frozen cartons; they then stood aside and indicated to the longshoremen that the boxes were ready to be placed on the cargo rack. This process was repeated. At

some point during the unloading, Raymond reached for a carton at shoulder height in a section where the crew members had presumably loosened them. As Raymond pulled the carton towards him, it became apparent that it had not been loosened and was frozen solidly to another carton. Both cartons came off the tier suddenly. Raymond tried to hold them, but was forced to the deck by their weight. Shortly thereafter, he became ill and had trouble breathing. He left the hold and, after an attack of vomiting on deck, decided to go home. As he drove his car towards the end of the pier on which the Union hall and shape-up office were located,[1] he collided with a parked truck. He was found dead in the car. Plaintiff's medical expert testified, without contradiction, that Raymond had suffered a fatal heart attack directly caused by the severe, unexpected exertion and stress imposed upon him when he tried to handle the two cartons that came off the tier instead of the one he was expecting.

We have no difficulty ruling as a matter of law that on these facts the crew members were not the borrowed servants of the stevedore. The prime requisite for invoking the borrowed servant doctrine is some sort of control by the borrower over the loaned employee(s). The seminal case is *The Standard Oil Co.* v. *Anderson*, 212 U.S. 215 (1909). There, plaintiff was working in the hold of a ship when he was injured by being struck by a load of oil cases that were unexpectedly lowered into the hold. All loading was done by employees of the stevedore except for the operation of the winch which lowered the cargo into the hold; this was done by an employee of defendant. In holding that the winchman was not a borrowed servant, the Supreme Court noted that he was hired and paid by the defendant, *id.* at 219, that defendant had the right to discharge him, *id.* at 225, and that the signal to the winchman to commence lowering was informational, not an order, and showed cooperation, not subordination, *id.* at 226. *See also Gaudet* v. *Exxon Corporation*, 562 F.2d 351, 355-57 (5th Cir. 1977), *cert.*

[1] This pier was about one-half mile away from the pier at which the unloading was being done. Presumably, Raymond intended to collect his pay on his way home.

denied, 436 U.S. 913 (1978); *Lopez* v. *Oldendorf*, 545 F.2d 836, 839 (2d Cir. 1976), *cert. denied*, 431 U.S. 938 (1977); *Dugas* v. *Pelican Construction Company, Inc.*, 481 F.2d 773 (5th Cir. 1973); *Ruiz* v. *Shell Oil Company*, 413 F.2d 310 (5th Cir. 1969); 1B Benedict on Admiralty § 12 (7th ed. 1976).

The evidence in this case is totally lacking any of the indicia that is necessary for a finding of borrowed servants. There was no control or direction of the work of the crew members by the stevedore or longshoremen, they were not paid directly or indirectly by the stevedore and the stevedore had no employer relationship with them at all. The ship sent the crew members into the hold to loosen up the frozen cargo because it was to its advantage as well as the stevedore's and longshoremen's to get the cargo unloaded as quickly as possible. This is a classic example of cooperation, not subordination.

We also find, however, that, under these facts, there could be no legal liability on the part of the vessel. In *Anderson* v. *Iceland S.S. Co.*, 585 F.2d 1142 (1st Cir. 1978), we held "[t]he intent of the 1972 amendments [to the Longshoremen's and Harbor Workers' Compensation Act] was to abrogate the absolute liability of the vessel. To find liability on the part of the ship, there must be evidence that the ship breached a duty it owed to the plaintiff." *Id.* at 1151. In *Anderson*, we found the ship not liable for a slippery condition on the pier due to wet and leaking cartons of frozen fish.

In *Johnson* v. *A/S Ivarans Rederi*, 613 F.2d 334 (1st Cir. 1980), we reviewed the legislative history of the Longshoremen's and Harbor Workers' Act and pertinent case law and legal authority to determine the standard of care applicable in a longshoremen's action against the vessel for personal injuries. We found that the ship owes longshoremen a duty of reasonable care under the circumstances. Our analysis led to the adoption of the following standard.[2]

---

[2]This case was, of course, tried prior to the decision in *Johnson* v. *A/S Ivarans Rederi*, 613 F.2d 334 (1st Cir. 1980).

The standard of reasonable care under the circumstances permits a finding of negligence upon a showing:

(1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury;

(2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and

(3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger.

Under this standard, the principal inquiry will be whether the vessel permitted the existence of a condition that posed an unreasonable risk of harm to the longshoreman. Whether the risk of harm was in fact unreasonable may be determined by balancing the usefulness to the ship of the dangerous condition and the burden involved in curing it against the probability and severity of the harm it poses.

Application of the standard to the facts of this case compels the conclusion that there was no basis for finding the ship liable. First, while it might be argued that the crew members knew or in the exercise of reasonable care could have determined that not all the frozen cartons had been pried apart, this is not the kind of condition that either the Act or the cases contemplated as a basis for holding a vessel liable. In the normal case, it is a condition of the ship, not the cargo, for which the vessel may be held responsible. As we noted in *Anderson* v. *Iceland S.S. Co.*, "[t]he stevedore is hired for its expertise in handling cargo, including cargo which arrives from its journey in less than optimal condition." 585 F.2d at 1151. If one of the crew members left a crowbar among the cartons in such a position that it injured a longshoreman, there might be liability. But liability cannot be bottomed on a condition of the cargo known to the longshoremen which the crew, at the

request of the stevedore, attempts to correct. Although the crew members were not borrowed servants, they were acting as longshoremen in helping to unload the hold. They were not directing the unloading. In *Johnson* v. *A/S Ivarans Rederi*, 613 F.2d 334, we held the vessel liable for failing to either rope off a bulkhead opening or close the hatch covers to a hold into which a longshoreman fell while trying to go up to the deck. This condition, which exists because of the failure of the vessel to exercise reasonable care, is the kind for which it may be liable.

Second, there is no evidence from which it could be found that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen. It would be stretching credulity to find that there was an unreasonable risk of harm to an experienced longshoreman in attempting to hold two cartons weighing about one hundred ten pounds, even though the extra fifty-five pounds were unanticipated. A heart attack due to sudden and unexpected physical exertion and stress, which are an integral part of a longshoreman's work, is not a harm that can reasonably be anticipated or guarded against.

Examining the evidence in the light most favorable to the plaintiff, there is no basis for finding that the vessel was negligent in any way.

Reversed.

ALDRICH, *Senior Circuit Judge* (concurring). I agree with the second portion of the court's opinion disposing of the appeal on the basis of *Johnson* v. *A/S Ivarans Rederi*, 1 Cir., 1980, 613 F.2d 334, but, with due respect, I feel obliged to note that I find the court's treatment of the borrowed servant aspect oversimplistic.

In *Standard Oil Co.* v. *Anderson*, 1909, 212 U.S. 215, the Supreme Court stated that to determine whether a given

employee is a borrowed servant, "we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work." 212 U.S. at 221-22. This inquiry is based on the fundamental limitation on the *respondeat superior* doctrine: "The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it." *Id.* at 221; *see Denton* v. *Yazoo & Mississippi Valley R.R. Co.*, 1932, 284 U.S. 305, 308; *Linstead* v. *Chesapeake & Ohio Ry. Co.*, 1928, 276 U.S. 28, 34.

In the *Anderson* formula, strictly speaking, the question of control is useful only in ascertaining whose work is being performed.* My brethren fail to note that in *Anderson* the shipowner did not let out all the stevedore work, but, from the beginning, reserved the winching to the ship's crew, and received payment therefor, 212 U.S., at 225. The attempt to make out a loan of employment on the basis that the winchman received directional signals naturally failed.

The present case is perhaps one of the rare instances in which the two questions, "whose work?" and "who controls?" yield different answers. It is at least clear that, contrary to *Anderson*, the crew members were performing the work of the stevedore, not of the ship. The stevedore had contracted to unload the cargo for a flat rate per ton. Under local custom, a substantial amount of distressed cargo would result in renegotiation of the contract. When, as here, only a minimal

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*Control has sometimes been considered the *sine qua non* of the borrowed servant rule. *See, e.g., Dornan* v. *United States*, 9 Cir., 1972, 460 F.2d 425, 428 (applying California law); *United States* v. *Degerstrom, Inc.*, 9 Cir., 1979, 408 F.2d 1130, 1133. A line of Fifth Circuit cases views the two questions as merely two among nine factors to be considered, no one of which is decisive. *See Gaudet* v. *Exxon Corp.*, 5 Cir., 1977, 562 F.2d 351, 355-56, *cert. denied*, 436 U.S. 913, and cases cited.

amount of cargo was stuck, the longshoremen would break it up themselves or with the assistance of crew members. The latter course was followed here as a matter of convenience, rather then sending ashore for the necessary tools. While it was doubtless to the advantage of the ship to have the cargo unloaded quickly, its two crew members, in assisting in the unloading, unlike *Anderson*, were doing work which, under the contract, the stevedore was obligated and paid to perform. *Cf. Linstead* v. *Chesapeake & Ohio Ry. Co.*, ante, 276 U.S. at 34.

The question of control is more difficult. The court makes much of the fact that the crew members were not paid by the stevedore, and that there was some advantage to the ship in having the cargo unloaded quickly. These should not be determinative. The payment of wages, the power of discharge, etc. "are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control." *Standard Oil Co.* v. *Anderson*, ante, 212 U.S. at 225. In the usual borrowed servant case, these reside in the general employer. *E.g.*, *Denton* v. *Yazoo & Mississippi Valley R.R. Co.*, ante; *Linstead* v. *Chesapeake & Ohio Ry. Co.*, ante. And certainly it would be the unusual case where the loan of its servant did not confer some sort of benefit on the general employer. I would resist the thought that the borrowed servant rule operates only when the special employer assumed responsibility for the employee's salary, and the arrangement was without advantage to the general employer.

Here, in a sense, the crewmen were self-directed in loosening the cargo, leaving open the question of who would have corrected them had they been seen to be neglectful. Quite arguably it could have been the stevedore. I see no point, however, in pursuing the matter, even if control, as distinguished from whose work was being done, should be thought determinative. My sole purpose is to observe that this "extraordinarily troublesome" area, *Wilson* v. *Nooter Corp.*, 1 Cir., 1973, 475 F.2d 497, 500, should not be handled as easily as do my brethren.

No. 80-642

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ELEANORE M. RAYMOND, ADMINISTRATRIX OF THE ESTATE OF ALVARO J. RAYMOND,
PETITIONER,

v.

I/S CARIBIA,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STATEMENT OF THE CASE

The Petitioner's decedent was a longshoreman discharging cartons of frozen fish from the refrigerated hold of the vessel CARIBIA. The cartons were 15 inches by 12 inches by 12 inches and weighed approximately 55 pounds. He was part of a gang of 12 longshoremen in the hold manually breaking down

and discharging that cargo. He had been performing those stevedoring duties for approximately two hours when he and the other longshoremen working in one corner of the hold encountered certain cartons which were sticking together, being frozen to a greater degree than the balance of the cartons, and which thus did not yield to the gang's use of hand hooks. When the gang encountered that difficulty work stopped.

The crowbars and ice bars which were customarily maintained by the stevedoring company for that purpose were in a tool shed on shore. To save time, since the longshoremen work on piece work, the longshore boss requested some of the crew of the vessel to use crowbars on the cartons.[1]

Two crewmembers, who were not otherwise identified by the Petitioner's witness, applied the momentary leverage of a crowbar to the seams between the cartons as the longshoremen stood by and watched them. The crewmembers made no attempt to remove the cartons; the cartons plainly remained in their same tiered positions with all interfaced frozen surfaces re-encountering each other. The crewmembers left to the longshoremen the burden of moving the cargo and overcoming such residual sticking as would instantly occur. There was no conversation between the longshoremen and the crewmembers, but the longshoremen identified the cartons which needed the preliminary leverage of crowbars and watched while the rough loosening was accomplished.[2]

The crewmembers were not asked to place dunnage in between the cartons to forestall the natural tendency of the cartons' surfaces to re-adhere to some degree in the refrigerated

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[1] Longshoremen at Gloucester are paid by the ton rather than by the hour. Although when the difficulties encountered are extensive they may negotiate with their employer for a higher rate of pay, speed serves the economic interest of the longshoremen.

[2] It is unknown whether the unidentified crewmembers spoke English.

hold. Discharging such cargo was within the routine tasks of the longshoremen. The crew did not in any degree discharge the cartons. That was the work of the longshoremen. The crew did not purport to dislodge or disturb the cartons from their position in the stow, but only to momentarily pry against the heavy solidification. The longshoremen were accustomed to a sticking condition of the cartons and had their hand hooks for that purpose. The decedent was an experienced longshoreman familiar with frozen cargo; he was accustomed to handling weights approximating 100 pounds. He was present when the work stopped and stood watching while the crowbars were being used on the cartons. He observed that the crewmembers only applied the gross force of the crowbars to initially loosen the frozen cartons and that the cartons then settled back to their original position with the weight of an upper tier still bearing on the lower tier.

Neither the decedent nor any of the other longshoremen indicated that the limited loosening of the cargo by the crewmembers was improper or inadequate to permit them to continue the manual breaking down of the cargo.

The longshoremen resumed the manual handling of the cartons and taking them from the tiers and placing them on a rack for discharge. After several cartons had been discharged without difficulty, the Petitioner's decedent reached a carton which was on a tier at a height about at the decedent's shoulder and eye level. His view of the cartons was not obscured. Testimony was presented that the decedent reached over the far edge of the carton and tilted it toward him. The carton from the next lower tier adhered to the bottom surface of the upper carton but the decedent continued to tilt those two adhering cartons toward him. He then angled both cartons upward in a tilted position. Finally he pulled them both toward him until the lower surface of the bottom carton came free from the carton underneath it. The two adhering cartons he was pulling toward him did not slip off the lower tier at

any time. After he had pulled the two cartons free of their tiered position, he began to lower them, but as he did so he went down on one knee, apparently under the weight of the two cartons. Sometime thereafter, the decedent was noticed to look pale and to complain of not feeling well. He declined medical assistance and asserted his ability to get home without aid. He drove from the pier where he had been employed to a pier approximately one-half mile away where the Union Hall and Shape-Up offices were maintained. Near the Union Hall his car was in a collision with a truck. He was found dead in his car after that accident. A medical expert called by the Petitioner testified that it was his opinion that the decedent had suffered a heart attack and that the heart attack was caused by the particular action of lifting the double weight of the two cartons earlier that afternoon.

The shipowner was charged with negligence for failing to properly separate the cartons and for failing to warn the decedent of the risk resultant from the adhesive quality of the frozen cargo.[3] The case was submitted to a jury after denial of defendant's motion for a directed verdict. The jury found liability against the defendant under 33 U.S.C., Chapter 18, Section 905(b), the text of which follows:

> "(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be

[3] Johan Hagenaes and A/S Norsk Frysetransort are companies affiliated with I/S Caribia, respondent-shipowner.

permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

On appeal by the defendant shipowner, the First Circuit Court of Appeals reversed on the grounds that the Court should have granted the motion for judgment notwithstanding verdict in favor of the defendant. The Court of Appeals held that under the standards set forth in *Johnson* v. *Ivarans Rederi*, 613 F.2d 334, (1st Cir. 1980) there was no basis for finding the ship negligent. The Court found that there was no unreasonable risk of harm and that under all the circumstances the ship had not failed to exercise reasonable care.

Argument

I. THE PETITIONER HAS FAILED TO CITE, AND THERE DOES NOT EXIST, ANY APPLICABLE CONFLICT AMONG THE CIRCUITS.

II. THE PETITIONER HAS NOT DESCRIBED, AND THERE DOES NOT EXIST, AN IMPORTANT QUESTION OF FEDERAL LAW APPROPRIATE FOR RESOLUTION BY THIS COURT.

I. THE PETITIONER HAS FAILED TO CITE, AND THERE DOES NOT EXIST, ANY APPLICABLE CONFLICT AMONG THE CIRCUITS.

The decision of the First Circuit herein accords with and does not conflict with the standards set forth by the First,

Third and Ninth Circuits in *Johnson* v. *Ivarans Rederi*, 612 F.2d 334, (1st Cir. 1980); *Griffith* v. *Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116, (3rd Cir. 1977) and *Santos* v. *Scindia Steam Navigation Co.*, 598 F.2d 480, (9th Cir. 1979). There is no conflict among the Circuits which would inure to the benefit of the Petitioner.[4]

In the present case, the First Circuit met the concerns which it had voiced in *Johnson* supra, and which had been expressed by the Ninth Circuit in *Santos* supra, and by the Third Circuit in *Griffith* supra. Within that precedential framework it applied a standard which considered all the factual circumstances and which was consistent with the traditions of maritime law and the legislative intention to promote safety. As the Third Circuit noted in *Griffith* supra, the particular application of the general standard of care must be formulated on a case-by-case basis. *Griffith*, p. 126. In the instant case the First Circuit determined that on the facts presented the accepted standard of care had not been violated.

There is no dispute between the Circuits; the only dispute is between the Petitioner and the First Circuit. The Court properly ruled that in all the circumstances there was not an unreasonably dangerous condition and that the shipowner had not failed to use reasonable care to protect the longhsoremen in the performance of their duties.

The Petitioner has mistaken both the First Circuit's holding and the facts by framing the issue as the First Circuit's refusal to find liability for a "dangerous condition of cargo created

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[4] As the First Circuit noted in Johnson, the Second, Fourth, Seventh and Fifth Circuits have adopted a standard of care which incorporated the principles of Restatement of Torts, Second, Sections 343 and 343A. Petitioner has not contended that this standard of care should have applied in lieu of the standards of *Griffith*, *Johnson* and *Santos* which the First Circuit followed herein.

by the shipowner."[5] (Petition, p. 6)

Initially and contrary to the Petitioner's factual assertion that the decedent had "performed his work following the directions of the vessel's crew" (Petition, p. 9), the First Circuit found on the evidence presented that the crewmembers were not directing the discharging, (App. p. 16), and that the crew was merely assisting the longshoremen's own work. Despite the decision of the gang boss to expedite the discharging by requesting the crew to furnish the force of the crowbars rather than the longshoremen using their own gear and renegotiating a higher rate of pay, it was clear that the preliminary loosening of the cartons was a duty and a skill of the longshoremen and not of the crew.

Secondly, contrary to Petitioner's assertion as to the basis for the First Circuit's holding (Petition, p.9) the First Circuit's opinion is devoid of the concepts of assumption of the risk and of the Restatement of Torts, Second, Sections 343 and 343A. The Court's statements to which the Petitioner has taken exception do not re-interject those concepts which the First Circuit expressly disavowed in *Johnson*, supra. The Petitioner has suggested that the Court's observations imply that the decedent "assumed the risk of the frozen cargo." However, the Court's comments as to the relative roles of the crew and the longshoremen are not premised upon and do not reflect concepts of assumption of the risk. The First Circuit only stated the elementary fact, often noted by Courts, that the discharging of the cargo is the function of the stevedore and longshoremen and not that of the crew. *Knox* v. *United States Lines Company*, 294 F.2d 354, (3rd Cir. 1961), 1961 AMC 1708; *Bell* v. *Nihonkai Kisen, K.K. Tokyo*, 204 F. Supp. 230, (D.C. Ore. 1962), 1962 AMC 1306; *Baker* v. *S/S*

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[5] Indeed the First Circuit suggested that a dangerous condition created by the crew in the cargo area might be a basis for liability; "If one of the crewmembers left a crowbar among the cartons in such a position that it injured a longshoreman, there might be liability." App. p. 17.

Cristobal, 488 F2d 331, (5th Cir. 1974), 1974 AMC 36; *Mende* v. *H/F Eimskipafelag Islands*, 1972 AMC 1055 (D.C. Md. 1971); *Nixon* v. *Zim Israel Navigation Co., Ltd.*, 1971 AMC 1951 (D.C. Fla. 1971); *Anderson* v. *Iceland S.S. Co.*, 585 F.2d 1142, (1st Cir. 1978).

However, if, as Petitioner states, the risk was that the cargo was frozen this would accord with the Court's determination that there was no unreasonable risk. Indeed that the cargo was frozen was not a risk; it was a fact native to a cargo of frozen fish in a refrigerated hold. The momentary force applied by the crowbars could not prevent the cartons from re-adhering. The crew did not, was not expected to, and did not purport to do more than they did. Overcoming the residual tendency of the surfaces to adhere and dislodging the cartons was the routine work of the longshoremen and, as the First Circuit held, posed no unreasonable danger to them.

In none of the cases cited by the Petitioner did the Court find liability in a condition of the cargo where, as here, the cargo handling was being supervised by the longshoremen, the stowage was proper, and no substandard equipment was involved.[6]

The First Circuit's evaluation of all the circumstances differs from that which Petitioner has advanced; it does not differ from the principles and application of those principles previously adopted by the First Circuit in *Johnson* supra, and by the Third, Seventh and Ninth Circuits in *Griffith*, supra, *Mathews*,[7] and *Santos*, supra.

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[6] In *Santos*, supra, where the longshoreman was injured by a sack of grain falling from a pallet being lowered by the ship's winch which had been slipping, neither the Court nor the plaintiff suggested that the ship had any liability for the way the cargo was stacked on the pallet.

[7] *Mathews* v. *Ernst Russ Steamship Company*, 603 F.2d 676 (7 Cir. 1979)

II. The Petitioner Has Not Described, and There Does Not Exist, an Important Question of Federal Law Appropriate for Resolution by This Court.

The First Circuit explicitly premised its decision herein on its previous holding in *Johnson*, supra. The Petitioner does not contend that those principles were not the proper standards by which to determine the ship's liability; Petitioner simply asserts that the First Circuit misapplied the standard to the facts. On its face, this argument does not raise an important issue of Federal law which requires resolution by this Court. The issues raised by the Petitioner are fundamentally a disagreement with the First Circuit's evaluation of the factual circumstances and its holding that in those circumstances, including a consideration of the type of condition and danger, it was not established that any negligence of the shipowner-caused the injury to Petitioner's decedent.

The First Circuit's evaluation of the factual circumstances presented was a proper application of the principles it had previously adopted in *Johnson*, supra. Specifically, the First Circuit found that there was no evidence from which it could be found that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to the longshoremen. As the Court of Appeals noted, it was not disputed that longshoremen commonly handle weights approximating 100 pounds. The decedent had a clear view of the cartons as he tilted them up and slid them the 12 to 15 inch dimension preliminary to receiving the full weight of the two cartons. The Court concluded that, "It would be stretching credulity to find that there was an unreasonable risk of harm to an experienced longshoreman in attempting to hold two cartons weighing about 110 pounds even though the extra 55 pounds was unanticipated." (App. p. 18) Thus, and in accord with the requirements of Johnson, supra, the Court found that, even assuming arguendo that the first criteria of *Johnson*

had been met, i.e., that the vessel knew of the condition which led to the injury, there was no factual basis for finding that the two remaining elements of the Petitioner's cause of action had been established, namely that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to the longshoremen and that the vessel failed to exercise reasonable care to protect the longshoremen against that danger.

In the instant case, the First Circuit did not hold that the Petitioner's decedent assumed the risk of discharging the frozen cartons or that his contributory negligence barred his recovery. Rather, the First Circuit held that the condition of 15-inch cartons was not unreasonably dangerous to the longshoremen, that the carton's removal was a task not unreasonably suited to the longshoremen's ordinary skills, and that the risk of a heart attack from sudden physical exertion was a risk to the longshoremen which the shipowner could not guard against.

The Petitioner has mistakenly equated a holding that in all the circumstances the shipowner was not negligent with a holding which must rely upon the principles which were clearly discarded by the First Circuit in *Johnson*, supra, and not revived in the instant case. The First Circuit's evaluation of the factual circumstances and its conclusion that under the standards of *Johnson*, supra, *Griffith*, supra, *Santos*, supra, and *Kermerac* v. *Compagnie Generale Transatlantic, Inc.*, 358 U.S. 625, 79 S.Ct. 406, 3L.Ed. 2d 550 (1959), the vessel was not negligent does not present an issue of Federal law appropriate for resolution by this Court.

Conclusion

The decision of the First Circuit Court of Appeals was proper under the existing law as applied to the facts. It does not represent a conflict among the Circuits and it does not present

an issue of Federal law appropriate for resolution by this Court. It is, therefore, submitted that the Petition for Certiorari to the First Circuit Court of Appeals should be denied.

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